BEFORE THE
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580

In the Matter of

Prerecorded Message EBR Telemarketing) Project No. R411001

JOINT COMMENTS

OF THE

UNITED STATES CHAMBER OF COMMERCE,

THE COALITION FOR HEALTHCARE COMMUNICATION,

THE CONSUMER BANKERS ASSOCIATION,

THE MAGAZINE PUBLISHERS OF AMERICA,

THE MORTGAGE BANKERS ASSOCIATION,

THE NATIONAL NEWSPAPER ASSOCIATION,

THE NEWSPAPER ASSOCIATION OF AMERICA,

AND

THE INDEPENDENT INSURANCE AGENTS AND BROKERS

The Chamber of Commerce of the United States ("Chamber"), the Coalition for Healthcare Communication ("CHC"), the Consumer Bankers Association ("CBA"), the Magazine Publishers of America ("MPA"), the Mortgage Bankers Association ('MBA"), the National Newspaper Association ("NNA"), the Newspaper Association of America ("NAA"), and the Independent Insurance Agents and Brokers of America, Inc. ("IIABA"), (collectively, the "Joint Parties") are pleased to submit these comments in support of the proposed modifications to the Telemarketing Sales Rule ("TSR").

While benefiting all businesses, the proposed changes would particularly ease the regulatory burdens imposed on small businesses by the TSR while promoting U.S. employment. At the same time, these modifications will serve the needs of consumers without limiting in any way the telemarketing protections of the FTC's recent Do-Not-Call rules or the legitimate privacy interests of the customers of American businesses.

The Chamber is the world's largest not-for-profit business federation. Founded in 1912, the Chamber represents over 3,000,000 businesses and business associations.

The Coalition for Healthcare Communications includes company and trade association members that engage in medical public relations, advertising, publishing and education. The Coalition focuses on the role of professional communication in the delivery of efficient and effective healthcare in America.

The Consumer Bankers Association was founded in 1919 and provides leadership, education, research and federal representation on retail banking issues such as privacy, fair lending, and consumer protection legislation/regulation. CBA members include most of the nation's largest bank holding companies as well as regional and super community banks that collectively hold two-thirds of the industry's total assets. CBA is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer financial services, including auto finance, home equity lending, card products, education loans, small business services, community development, investments, deposits and delivery.

The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 400,000 people in virtually every community in the country. Its membership of approximately 2,900 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, life insurance companies and others in the mortgage lending field.

The Magazine Publishers of America (MPA) is the industry association for consumer magazines. Established in 1919, the MPA represents more than 240 domestic publishing companies with approximately 1,400 titles, more than 80 international companies and more than 100 associate members.

The National Newspaper Association, founded in 1885, represents 2,500 community newspapers. Most are family-owned and operated and published weekly with a typical circulation of fewer than 10,000 copies.

The Newspaper Association of America is a non-profit organization representing more than 2,000 newspapers in the United States and Canada. Sixty-percent of the NAA membership represents small to medium-sized newspapers with a circulation size of less than 25,000.

Founded in 1896, the Independent Insurance Agents and Brokers of America, Inc., is the Nation's oldest and largest national association of independent insurance agents and brokers, representing a network of more than 300,000 agents, brokers, and their employees in all 50 states.

I. The TSR Should Be Amended To Allow Prerecorded Messages To Customers Where An Established Business Relationship Exists

The Joint Parties strongly support the Commission's proposal to amend the TSR to fulfill the statutory mandate to "maximize the consistency" of its regulations to those regulations regarding prerecorded messages to residential customers adopted by the Federal Communications Commission pursuant to the Telephone Consumer Protection Act of 1991. *See Do Not Call Implementation Act,* Pub. L. No. 108-10, 117 Stat. 557. This change will usefully clarify the law to allow businesses the option of using a cost-effective, proven technology to improve their services to customers.

A. Voice Mail Messaging Benefits Consumers And Businesses

Voice mail messaging, as accurately described by the Commission in its NPRM, is quite well suited for customer-focused messages. Members of the Joint Parties include many businesses that would use voice mail messaging to provide a higher level of service to their customers, advise them of upcoming events of interest, and generally enhance the customer relationship. Businesses ranging from restaurants to retailers, from medical professionals to banks to newspapers, all seek cost-effective means to stay in touch with their customers and provide information about the customers' account and service.

Voice mail messaging is a useful and efficient technological means of providing value to a consumer. For example, newspapers have used voice mail messaging to contact existing customers to confirm a customer's request to suspend service, or to advise them that a newspaper has been redelivered at a subscriber's request. Individual phone calls using live operators would be a slower and more costly means of assuring the customer that his or her service request has been received and acted upon. Furthermore, voice mail messaging is particularly attractive to smaller businesses, including many members of the Joint Parties, because it is far more cost-effective than telemarketing through the use of live sales representatives.

At the same time, abusing a customer relationship can lead directly to the loss of that customer's business. The prerecorded voice mail calls under consideration are limited to those customers with whom an existing business relationship exists under the current TSR. The organizations on this comment represent business concerns for which their existing customers are among their most important assets. Existing customers are treated with the utmost care – whether they be customers of retail stores, mortgage or other financial institutions, newspaper or magazine subscriber. These customers are treated with the utmost respect and care. Given that it is well-understood that the cost of acquiring a new customer is far greater than the cost of retaining an existing customer, the desire not to drive a customer away provides a strong self-incentive to use voice mail messaging – just like other forms of communication – carefully and judiciously.

Voice mail messaging also provides the additional benefit of ensuring improved quality control, because all messages can be double-checked before being delivered. Most importantly, as the Commission already recognizes, voice mail messages completely avoid the problems of abandoned calls and dead air that led the Commission to adopt its current form of the TSR. The NPRM correctly concludes that "using prerecorded messages to consumers with whom the seller has an established business relationship would enable a telemarketer to preclude completely some of the odious side effects of predictive dialers." Even more, voice mail messaging provides easy, non-confrontational means of opting-out that have greater assurance of accuracy than opt-outs handled by live operators who may commit transcription errors.

B. The FTC Should Apply Its Requirement About The Timing Of Opt-Out Option Flexibly

The FTC has proposed to require that the prerecorded message must, within two seconds of a completed greeting: "promptly play[_] a prerecorded message that: (A) presents an opportunity to assert an entity-specific Do Not Call request pursuant to §310.4(b)(2)(iii)(A) at the outset of the message with only the prompt disclosures required by §310.4(d) or (e) preceding such opportunity." Subsection (d) and (e) require disclosure of the identity of the caller and the purpose of the call for for-profit and non-profit calls, respectively.

The Joint Parties understand the purpose of the proposed requirement and, in broad terms, support both the goal and the proposed language. However, we note three concerns: First, we take as a given that advertisers will not be required to provide the opt-out notice before stating the identification and statement of purpose of the call. Doing so would inappropriately confuse consumers because they would often be asked to opt out of a call before they were told its purpose.

Second, businesses using telemarketing should have sufficient flexibility to determine the most appropriate means of providing the required disclosure within the context of the prerecorded message and their existing systems. This means that voice mail messages should not be forced into a pre-set, rigid formula.

Third, advertisers should have some discretion regarding how their customers should be able to register a Do Not Call request. The use of each of these techniques – using 800 numbers, live operators, or interactive dialing pads -- has unique advantages, disadvantages, and costs depending on the context. Businesses should have the flexibility to adopt the mechanism that is most efficient and effective for them and their existing customers.

II. The Joint Parties Support DMA's Request For Modification Of The Manner In Which Three Percent Call Abandonment Is Calculated

The Commission has also requested comment on a proposal by the Direct Marketing Association to revise the method for calculating call abandonment from the current per day, per calling campaign test to the 30-day measurement period contained in the rules of the Federal Communications Commission implementing the Telephone Consumer Protection Act of 1992. The Joint Parties support that change because it furthers telemarketing efficiency without creating any perceptible effect on consumers. Indeed, it will alleviate a regulatory burden that, among other things, applies disproportionately to small businesses.

There can be no dispute that the FTC's current methodology for measuring the rate of abandoned calls conflicts with that of the FCC. Both agencies have recognized that fact. An entity that complies with the FCC's standard could be in non-compliance with that of the FTC if the calls are also subject to FTC jurisdiction. It is no answer to assert, as does the FTC, that one can "comply with both" by complying with the FTC's standard. 69 *Fed. Reg.* at 67291. That merely elevates the FTC's standard to a preeminent position over the FCC, although Congress has given the FTC no authority to supersede the FCC in this area. If anything, Congress assigned the primary authority to regulate predictive dialers to the FCC in the TCPA, not the FTC.

The current per day, per campaign measurement gives businesses little room to adjust if the number of live answers exceeds the predicted value on a given day. In general, the smaller the list or the smaller the campaign (or the fewer days over which the call abandonment rate is measured), the more likely that the abandonment rate may deviate from the targeted rate of three percent. A modestly longer period, such as the 30 days in the FCC's rule, will reduce the deviation and allow sellers to manage their campaigns more efficiently.

In particular, the current test for call abandonment in the TSR inflicts a disproportionate harm on smaller businesses. Smaller businesses have smaller calling lists; one consequence of this is that a small business may inadvertently exceed the three percent figure comparatively quickly. To stay within the limits, the small business must recalibrate its dialing equipment, hire more sales representatives (which could cost overtime rates under the per day test), or risk violating the law. A 30-day period would give the small business valuable flexibility in tailoring its telemarketing to meet regulatory requirements.

Newspapers, for example, use live operator telemarketing to advise subscribers that a subscription may soon lapse or to offer new or renewed subscriptions. Under the TSR rule, if a particular campaign happens to be using a list which has more live answers than anticipated, the newspaper essentially would have to recalibrate the calling and/or revert to a one line to one representative ratio, a higher cost approach that loses the efficiencies of the technology.

We note the FTC's expressed concern that a 30-day period might allow a seller to cause abandoned calls to fall disproportionately on particular groups of presumably less desirable customers. However, we do not see how the choice of the measurement period addresses that concern. Under either program, the incentive for telemarketers is to effectively reach the maximum number of likely customers, not to target less desirable customers.

III. Conclusion

For the foregoing reasons, the undersigned joint parties respectfully urge the Commission to modify the TSR as discussed in the Notice.

Respectfully Submitted
On behalf of

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